In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1542

DENZIL R. ALLEN, PETITIONER

v.

ROLLAND F. VANCANTFORT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, then a lance corporal in the United States Marine Corps, was, on June 5, 1968, charged before a general court-martial, convened at Da Nang, South Vietnam, with five specifications of premeditated murder, in violation of Article 118, U.C.M.J., 10 U.S.C. 918. The convening authority had directed, before the trial, that the case be treated as non-capital (Pet. App. 34, 53). Petitioner then entered a plea of guilty with respect to all five specifications and was sentenced to twenty years' confinement at hard labor, a reduction to Pay Grade E–1 and dishonorable discharge from the service. On appeal to the United States Navy Court of Military Re-

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view, the conviction was affirmed, and the United States Court of Military Appeals denied a petition for further review (Pet. App. 32, 55–61).

Petitioner then instituted the present habeas corpus proceedings, seeking to set aside his conviction essentially on the grounds: (1) that his military counsel was ineffective in the manner in which he elected to present an insanity defense, and (2) that the acceptance of the guilty plea was in violation of military law because the crimes charged were capital offenses.

These contentions were exhaustively analyzed and properly rejected by both the district court (Pet. App. 40–71; 316 F. Supp. 222) and the court of appeals (Pet. App. 31–39; 436 F. 2d 625); we rely here on the comprehensive opinions below.

In asserting the incompetence of counsel in arranging the guilty plea without raising the defense of insanity—a defense which his counsel knew could be presented on appeal under military law and which he planned so to raise and did in fact raise on appeal (Pet. App. 36–38, 52–61)—petitioner relies on assertedly conflicting cases dealing with incapacity to stand trial (Pet. 14–18). Those cases, however, are inapposite; there is in this case no evidence which raises a serious question of petitioner's competence to stand trial under the standard of *Dusky* v. *United States*, 362 U.S. 402, or of his capacity to agree to the guilty plea or confess his guilt.

Accordingly, under the circumstances of this case, the court below properly found (Pet. App. 36) that the strategy adopted by petitioner's trial counsel "not

only fails to shock the conscience but appears to have been eminently sound," particularly in view of the fact that the evidence against petitioner, including his own confession, was overwhelming and the fact that his "chances of obtaining a favorable report from the military psychiatrists available in Vietnam appeared to be remote" (Pet. App. 36).[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

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[1] Even if, as petitioner maintains (Pet. 21), counsel could have had petitioner sent to the United States for psychiatric evaluation, and then returned to Vietnam to stand trial (rather than enter a guilty plea), his decision not to do so was one of trial strategy. Counsel cannot now be faulted for electing the alternative course—equally proper under military law—of having his client plead guilty and then having him returned to the United States, where petitioner could submit to psychiatric evaluation and raise his insanity defense for the first time on appeal before the United States Navy Court of Military Review.

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